NO. 2 0 1 5 0

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH SICA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
For the Southern District of California,
Central Division.

REPLY BRIEF OF APPELLANT JOSEPH SICA

TO THE HEAD JUDGE AND JUDGES OF THE ABOVE-ENTITLED COURT:

COMES NOW appellant Joseph Sica and files this his reply brief.

PRELIMINARY STATEMENT

Since the beginning of these proceedings, the respective counsel for Paul John Carbo and Joseph Sica have worked together, as these points urged apply to both petitioners and appellants; and we respectfully ask permission to adopt whatever arguments and legal authorities are set forth in the reply brief of the appellant Paul John Carbo as and on behalf of Sica.

The motions in the lower court were heard together, the court having said:

> "THE COURT: Does anyone else wish to be heard for movants? If not, Mr. Sheridan --
>
> "MR. PARSONS: If your Honor please, might I just say, your Honor only called the Carbo matter --
>
> "THE COURT: Oh, no. Both matters are being heard."
>
> (RT p. 11)

See also Reporter's Transcript page 47:

> "MR. PARSONS: May it be understood that this evidence all goes in as to the Sica petition, as well as Carbo? They have not been formally joined here for the purpose

of hearing, but in the interest of brevity --

"THE COURT: Oh, yes. Everything that goes in will be applicable to both petitions.

"MR. PARSONS: Thank you.

"THE COURT: And everything that is said will be applicable to both, unless it is clearly indicated otherwise.

"MR. PARSONS: Very well. Thank you."

The government has made a rather full statement of all prior proceedings in this case, and one gathers that indirectly they contend that by reason of the numerous proceedings, motions and appeal, these petitioners have had their "day in court," as was urged by government counsel at the hearing on the application for bail before this court.

We were unaware that Judge Boldt had talked with Judge Tolin about this case, until Judge Boldt so stated at the hearing on July 17, 1964. Therefore, we could not have raised any objection prior thereto.

ARGUMENT

I

THE GOVERNMENT CONTENDS THAT THE ISSUE RAISED BY THE 2255 MOTIONS IS SO BASELESS AS TO APPROACH THE FRIVOLOUS BECAUSE WE DID NOT COMPLY WITH TITLE 28 U.S. CODE SECTION 144.

May we point out that when Judge Tolin came to his untimely death and Judge Boldt was named as successor judge pursuant to Rule 25 of the Federal Rules of Criminal Procedure, the writer of this brief hardly knew Judge Boldt, except as a district judge from a northern state. We did not know he had ever talked to Judge Tolin about this case until he had heard the motions for new trial and motions for judgment of acquittal, had pronounced judgment, the case had passed through this court on appeal and to the Supreme Court of the United States by way of *certiorari*. As to Sica, on more than one occasion he denied bail. All this time, so far as the writer of this brief knows, he kept to himself the fact that he had talked to Judge Tolin about this case. He never should have accepted the assignment under Rule 25 of the Federal Rules of Criminal Procedure. How could we have proceeded then by way of Title 28 U. S. Code section 144? It is preposterous to urge that we could or should have done so.

Only until he elected to make the statement on the motion

to modify was it at all possible -- could we have jumped up then in court and urged he was biased and prejudiced under Title 28, section 144? The government counsel are not so naive as to urge that we could have done so.

Prior to hearing this proceeding, we asked that another judge be named to hear it. This was proper. He was about to be a witness. He had become a party to the proceeding, by filing an affidavit. And whether he was prejudiced or not was beside the issue at the moment. He was a party litigant.

He even denied petitioner Sica the right of cross-examination. What did Judge Tolin say to him in their conversation? What did they discuss about this case? Numerous questions were put to Judge Boldt by Mr. Wirin and by written inquiries, so there can be no question about the extent of our proposed cross-examination. But did Judge Tolin tell Judge Boldt that he knew Sica; that he had come across him in the course of his duties as a former Assistant United States Attorney and then as United States Attorney? We had a right to pursue the matter with Judge Boldt, and, as any cross-examiner with any experience knows, one question leads to another. Cross-examination is the most powerful weapon known to a trial lawyer, and the members of this court surely know it.

Our position was made clear to Judge Boldt, as it must be clear to this court, as shown by the record on the hearing pursuant to section 2255:

> "THE COURT: Well, I want you first to address yourself to the matter of the change of judge -- conclude on that subject.
>
> "MR. WIRIN: All right. But, your Honor, the point of my argument that a judge other than your Honor should preside over this hearing is that we feel the necessity of calling your Honor as a witness. And then the very next step in the chain of logic -- and that is what I am trying to do, is put together the links in this chain of logic -- is that it would be undesirable, that it would be improvident, that it would be inappropriate for your Honor to preside at a hearing in which your Honor is also a witness. So that your Honor is ruling then upon the relevancy or the competency or the propriety of questions which we seek to propound to your Honor.
>
> "We also think, your Honor, it would be undesirable, similarly, for your Honor to

preside when we are questioning Mr. Goldstein; because we intend to question him in connection with matters which pertain to your Honor, and which pertain to communications between him and your Honor.

"So let me then state my position now summarily and be done at least so far as this opening argument is concerned. Since we desire to call witnesses, one of whom is your Honor, it is our desire, and it is our motion, that someone other than your Honor preside over the hearing, at least at the time when that interrogation, or those interrogations, go forward.

"I think that hasn't stated my position fully. We really go beyond that. We really feel that if your Honor is to be a witness, then your Honor's testimony will have to be judged by someone; and that someone should not be your Honor, but should be some other judge.

"That is the thrust and the point of our motion, that your Honor call in another judge to preside over this hearing, and over all matters pertaining to the motion under 28 U.S. Code, Section 2255.

"THE COURT: Does anyone else wish to be heard for movants? If not, Mr. Sheridan --

"MR. PARSONS: If your Honor please, might I just say, your Honor only called the Carbo matter --

"THE COURT: Oh, no. Both matters are being heard.

"MR. PARSONS: Might I just briefly address your Honor?

"THE COURT: Certainly.

"MR. PARSONS: In the interest of brevity may I adopt the motion made by Mr. Carbo asking that your Honor ask for the appointment of another judge to hear these proceedings in their entirety. I filed a written objection, but I wish to supplement it now by an oral motion calling upon your Honor, if you will -- and with all due respect to your Honor -- to appoint, or, rather, to call in some other judge, or have some other judge named to hear these proceedings.

"THE COURT: It may be deemed that you have joined in the same motion, to the same effect, and that you have renewed all that you said in your written application.

"MR. PARSONS: Thank you, your Honor. And that I have made the same argument, in substance, that Mr. Wirin has made.

"THE COURT: Yes.

"MR. PARSONS: Thank you.

"And may I just say one thing in addition, just briefly. I am not, and cannot contend that you are prejudiced; and we have not pursued the usual form of attempting to disqualify you for the very reason we -- at least I am not able to. But if I might read a short paragraph from *In re Murchison*, 349 U.S. 133 at 136, which is in substance my argument, where that case says:

> ' . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . .

not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."'

Citing *Tumey v. Ohio*, 273 U.S. 510, 532.

'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."'

Citing *Offutt v. United States*, 348 U.S. 11, 14.

"As the great writer said, 'Caesar's wife must be above suspicion.'

"Thank you, your Honor."

(RT pp. 10 - 13)

ANCILLARY TO ALL OF THE FOREGOING IS THE FACT THAT WE WERE DENIED CROSS-EXAMINATION OF JUDGE BOLDT, WHICH CAME ABOUT IN THE FOLLOWING FASHION:

"MR. PARSONS: If your Honor please, may I adopt the arguments made, and the offer of proof made by Mr. Wirin on behalf of Mr. Carbo -- may I adopt them on behalf of Mr. Sica? And, with

all due respect and humility, your Honor, I do now ask permission to call the Honorable George H. Boldt as a witness in this case.

"THE COURT: The motion is denied.

"The request that you be deemed to have urged all that has been presented on behalf of counsel for Carbo is granted.

"MR. PARSONS: Very well. Thank you very much.

"May I point out this: In connection with my request to call you as a witness I have before me a record which indicates that on July 17th you said, 'I had occasion to talk with Judge Tolin after the verdict in this case before my case was concluded, and received some ideas of his views after the verdict in this case. . .'

"It is my desire to question you about that conversation; where it took place, who, if anybody,was present, and what was said by either you or Judge Tolin at that time.

"THE COURT: The only conversation that I had with Judge Tolin after the verdict in cause No. 27973 is that which is related in my affidavit,

and the whole substance of the conversation is stated there. That is the only time that I saw Judge Tolin after the verdict was rendered in your case.

"MR. PARSONS: May I say this, with all due respect to your Honor, you are denying us the right to examine an important witness which is essential to the establishment of due process of law.

"In all humility I say that to you as a lawyer.

"THE COURT: I do not agree, and your application is denied."

(RT pp. 65 - 66)

ANCILLARY TO ALL OF THIS IS THE FACT THAT JUDGE BOLDT ELECTED TO CHANGE THE RECORD IN THIS CASE, CONCERNING WHICH WE ARE MAKING A PORTION OF OUR ARGUMENT HERE, ON HIS OWN VOLITION AND WITHOUT NOTICE TO ANY OF COUNSEL.

We, of course, had obtained a copy of Judge Boldt's original remarks from the official reporter before he changed them. We are wondering what would happen to a clerk or to a lawyer appearing in a federal court who attempted to or caused an official record of actual remarks made in open court to be changed. No

judge has a right to do this without notice to counsel and their presence if they so desire. May we point out that changes made in a record amount to a denial of due process. In

Chessman v. Teets, 354 U.S. 156,

the court said, at page 162:

> "Under the circumstances which have been summarized, we must hold that the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process. We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. (See: *Powell v. Alabama*, 287 U.S. 45, 68 . . . ; *Snyder v. Massachusetts*, 291 U.S. 97, 105 . . . [and other cases].)"

The court in *Chessman, supra*, went on to say:

> "All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand."

CONCLUSION

The judgment below should be reversed, and we respectfully renew the prayer as urged in our opening brief. At a minimum, the orders of Honorable George H. Boldt, judge presiding as successor judge, should be vacated and a new judge assigned to pass upon all of the subsequent proceedings after the death of Judge Tolin.

Respectfully submitted,

RUSSELL E. PARSONS

Attorney for Appellant
Joseph Sica

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles California 90013, that on January 10th, 1966, I served the within REPLY BRIEF OF APPELLANT JOSEPH SICA on the following named party by depositing three copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 10th, 1966, at Los Angeles, California.

Signature

Orig. & 20 copies:
Frank H. Schmid, Esq.
Clerk, U. S. Court of Appeals
For the Ninth Circuit
U.S. Post Office and Court House Bldg.
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